

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KAY MESSINA,

Plaintiff,

v.

**ROCKY MOUNTAIN RECOVERY
SYSTEMS, INC.,**

Defendant.

Case No.: 1:16-cv-00642-RGA

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
REQUEST TO VACATE CLERK'S ENTRY OF DEFAULT, EXTEND DEADLINE
FOR SERVICE, AND TO AMEND COMPLAINT**

Plaintiff, Kay Messina, by and through counsel, pursuant to Federal Rule of Civil Procedure Rule 4, respectfully submits this Memorandum of Law in Support of her Motion to Vacate the Clerk's Entry of Default against this Defendant, Extend Deadline for Service, and to Amend the Complaint. There is good cause for this extension mainly because Defendant has posted inaccurate or untrue information about its address, has misled Plaintiff's attempts to locate an address, and seems to be evading service in general.

I. Facts & Procedural History

Plaintiff filed her Complaint on July 28, 2016. See Docket Entry 1. Plaintiff filed a Motion to Extend the Deadline for Service on October 25, 2016. See Docket Entry 3. This Honorable Court granted Plaintiff's Motion to Extend on November 1, 2016, extending the deadline to serve until December 9, 2016. See Docket Entry 5. The Complaint and Summons were served on Rocky Mountain Recovery Systems, Inc. on October 27, 2016. See Docket Entry 6. Defendant failed to file a timely response to Plaintiff's complaint. Consequently, Plaintiff requested an Entry of Default against Defendant. See Docket No. 7. Entry of Default was entered

1 against Defendant on November 21, 2016. See Docket No. 8. Plaintiff has since learned that she
 2 named the incorrect party in her Complaint, and served the Complaint and Summons upon the
 3 incorrect party. Plaintiff brings this motion in order to amend her Complaint to include the correct
 4 Defendant, vacate the Default against the incorrect party, and for an extension of the service
 5 deadline in order to serve the Amended Complaint and Summons upon the correct Defendant.

6 **II. Argument**

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 8 Federal Rule of Civil Procedure 55(c) provides that entries of default may be vacated “for
 9 good cause shown.” The “good cause” standard is less rigorous than the standard for vacating default
 10 judgments, as entries of default are essentially administrative tasks performed in many cases, as with
 11 this one, without regard to the merits of the action. See American Alliance Ins. Co. v. Eagle Ins. Co.,
 12 92 F.3d 57, 59 (2d Cir. 1996); Peoples, 299 F.R.D. at 58-59 (citing Meehan v. Snow, 652 F.2d 274,
 13 276 (2d Cir. 1981)).

14 Under Fed. R. Civ. P. 15(a), a motion for leave to amend a complaint “shall be freely given
 15 when justice so requires.” Fed. R. Civ. P. 15(a); see also, Forman v. Davis, 371 U.S. 178 (1962) and
 16 Sheppard v. River Valley Fitness One, L.P., 2002 WL 197976 (D.NH 2002). In Forman v. Davis,
 17 371 U.S. 178 (1962), the United States Supreme Court recognized a liberal amendment of pleadings
 18 policy embodied in Rule 15(a) of the Federal Rules of Civil Procedure. See Forman, 371 U.S. at 182.
 19 “The Supreme Court has held that ‘this mandate is to be heeded’ and that a motion to amend should
 20 not be denied unless there are compelling reasons such as ‘undue delay, bad faith or dilatory motive
 21 on the part of the movant ... [or] undue prejudice to the opposing party.’” See Picker Intern., Inc. v.
 22 Leavitt, 128 F.R.D. 3, 8 (D.Mass.1989) (citing Forman v. Davis, 371 U.S. at 182). In determining
 23 whether to grant leave to amend, the Court should also consider the effect any such amendment
 24 would have on judicial resources and the impact on the judicial system. See Stephenson v. Dow
 25 Chemical Co., 220 F.R.D. 22, 25 (E.D.N.Y. 2004). Further, the Court should consider whether the

1 proposed amendment would lead to an expeditious disposition of the litigation on its merits. See
 2 Chitimacha Tribute v. Harry L. Laws Co., 360 F. 2d 1157, 1163 (5th Cir. 1982).

3 Under Fed. R. Civ. P. (4), "if the plaintiff shows good cause for the failure [to serve
 4 within 90 days], the court must extend the time for service for an appropriate period." Good
 5 cause generally exists where despite the diligence of the party seeking relief, the party cannot
 6 reasonably meet the deadlines and granting the extension will not prejudice the other party.
 7 Andretti v. Borla Perform. Indus., Inc., 426 f.3d 824, 830 (6th Cir. 2005); See also Chancellor v.
 8 Pottsgrove Sch. Dist., 501 F.Supp.2d 695, 701 (E.D. Pa. 2007). This is true even when the party
 9 has missed a court's deadline. Andretti at 830. In examining this the Court considers four factors:
 10 (1) explanation for failure to submit filing on time; (2) importance of the filing; (3) potential
 11 prejudice in disallowing or allowing the filing; and (4) availability of continuance to cure.
 12 Reliance Ins. Co. v. Louisiana Land and Exploration Co., 110 F.3d 253, 257 (5th Cir. 1997); See
 13 also Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987). In applying factors, "the Court
 14 has great discretion in determining what kind of showing the moving party must show in order to
 15 satisfy the good cause requirement..." Thoman v. Philips Medical Systems, 2007 WL 203943 at
 16 *10 (D.N.J. Jan. 24, 2007). In this case: (1) Plaintiff has good reason for not yet making service
 17 and is requesting an extension before the time has run; (2) the extension of the service deadline is
 18 essential to Plaintiff pursuing her case; (3) Plaintiff would be prejudiced if she was not permitted
 19 to continue her case due to Defendant's failure to publish or provide a physical address; and (4)
 20 it is extremely likely that additional time will allow Plaintiff to locate Defendant.
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22
 23 Plaintiff has recently obtained an additional physical address for Defendant and has
 24 begun the process of personally serving Defendant at this newly-obtained address. With this
 25 information, Plaintiff believes that it is likely that Plaintiff will be able to serve Defendant at
 such address.

Respectfully submitted,

Dated: December 8, 2016

By: /s/ W. Christopher Componovo
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CERTIFICATE OF SERVICE

I hereby certify that I have served upon all persons listed below a true and correct copy of Plaintiff's Motion to Vacate the Clerk's Entry of Default against this Defendant, Extend Deadline for Service, and to Amend the Complaint, including the Memorandum and Proposed Order, in the above-captioned matter this 8th day of December 2016 via U.S. Mail to:

Rocky Mountain Recovery Group, LLC.
2851 S. Parker Road, Suite 716
Aurora, CO 80014

and

Bret T. Allred, Esq.
Wilkerson & Bremer Law Group, LLC
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Respectfully submitted,

Dated: December 8, 2016

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